

THE UNCONSTITUTIONALITY OF EXIT SEARCHES

David R. Dorey^{*}

INTRODUCTION

Lurking in plain sight at exits to certain United States government buildings are fixed checkpoints where people are detained and their personal belongings systematically searched before armed police officers give permission to depart the premises. The people subjected to these “exit searches” have not given their consent, yet they cannot refuse. These exit searches are not openly spoken about and have never before been comprehensively catalogued or studied; consequently, no empirical data exist on their exact specifications or pervasiveness.¹ The discussion of these searches in this Essay comes from their relatively brief mention in a lone judicial opinion, the author’s personal experiences, and a single news article. Despite the apparent lack of transparency in these programs, and perhaps because of it, these programs must be carefully examined and ultimately found unconstitutional. In a time when the Executive Branch routinely triggers concerns about privacy rights,² discussions about the appropriate

^{*} Associate, O’Melveny & Myers LLP. J.D., 2012, University of Pennsylvania Law School. The author thanks Professor Stephanos Bibas and the staff of the *University of Pennsylvania Journal of Constitutional Law* for invaluable assistance and insight in crafting this Essay.

¹ The scope of this Essay is limited to searches of the personal items of people leaving government property; I have titled these “exit searches.” This Essay does not address the constitutionality of searches being performed on people while they are exiting the United States, something which has sporadically been referred to by courts as an “exit search.” See, e.g., *United States v. Oriakhi*, 57 F.3d 1290, 1295–96 (4th Cir. 1995) (noting that the border search exception to the Fourth Amendment “rests on the fundamental principle of national sovereignty”).

² See, e.g., David K. Shieler, *Can You Frisk a Hard Drive?*, N.Y. TIMES, Feb. 20, 2011, at WK5 (highlighting the practice by Customs and Border Protection officers of searching the computers of certain individuals entering the country despite lacking any reasonable suspicion); Olivia Katrandjian, *Strip-Searches Grandma Says TSA Removed Her Underwear*, ABC NEWS, Dec. 3, 2011, <http://abcnews.go.com/blogs/headlines/2011/12/strip-searched-grandma-says-tsa-removed-her-underwear/> (describing how a “mortified” octogenarian was forced to remove her underwear by the Transportation Security Administration after she refused an x-ray body scan at an airport security checkpoint); Somini Sengupta, *Drones May Set Off a Flurry of Lawsuits*, N.Y. TIMES, Feb. 20, 2012, <http://bits.blogs.nytimes.com/2012/02/20/drones-may-set-off-a-flurry-of-lawsuits/> (describing how the Federal Aviation Administration has approved the use of unmanned aerial drones in

scope of individual privacy are necessary to prevent and reverse the quiet erosion of Constitutional protections.³

By its silence, Congress has tacitly approved warrantless, suspicionless exit searches of any person who enters a federal building, having delegated its authority to the Executive Branch via a broad statute which authorizes the Administrator of the General Services Administration (“GSA”) to “prescribe regulations that the Administrator considers necessary to carry out the Administrator’s functions”⁴ The GSA regulations codified pursuant to this general statute state, “Federal agencies may, at their discretion, inspect packages, briefcases and other containers in the immediate possession of visitors, employees or other persons arriving on, working at, visiting, or *departing from* Federal property.”⁵

The Supreme Court has approved an exception to the Fourth Amendment’s general prohibition on suspicionless searches for warrantless administrative searches in certain contexts, often citing the “special needs” of government to conduct specific, limited searches.⁶ Yet in virtually every case where the Court has approved a suspicionless search, the special need asserted was a safety or security interest; later cases have unequivocally declared that a safety interest is required. No exit search identified in this Essay is used to respond to any real, or even perceived, safety interest. Given these facts, the routine suspicionless search of employees and visitors *departing* federal property must be unconstitutional—a violation of their Fourth Amendment right to be free from unreasonable searches and seizures.

Part I of this Essay describes, with as much precision as possible, the details of exit search programs as they presently exist. Part II explains the principles underlying the Fourth Amendment’s blanket ban on unreasonable searches and traces the rise of the administrative search exception. It further explores how the Supreme Court

United States airspace and how this is likely to lead to challenges under the Fourth Amendment).

3 Indeed, decisionmakers may well be listening to the popular and academic outcry that such privacy violations have engendered. For example, the Ninth Circuit recently held that the government may not conduct border searches of personal computer devices without at least some “reasonable suspicion.” *United States v. Cotterman*, No. 09-10139, 2013 WL 856292 at *1 (9th Cir. Mar. 8, 2013) (en banc).

4 40 U.S.C. § 121(c) (2006).

5 41 C.F.R. § 102-74.370 (2011) (emphasis added).

6 *See, e.g.,* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653, 665 (1995) (upholding drug testing of student athletes without a warrant by a school district under a “special needs” exception); *Skinner v. Ry. Labor Execs.’ Ass’n.*, 489 U.S. 602 (1989) (upholding toxicological testing of railway workers without a warrant or reasonable suspicion under a “special needs” exception).

has recently heightened its scrutiny of special needs searches, making plain that any constitutional administrative search *must* be based on a particularized safety interest. Part III examines the Ninth Circuit case *United States v. Gonzalez*, the only case holding an exit search constitutional, but offers a number of reasons—such as a decidedly unsympathetic defendant who was caught stealing and the ineffective assistance of his counsel—for the erroneous ruling. Part IV revisits exit searches in light of recent Supreme Court precedent and the arguments proffered in *Gonzalez*, and suggests these exit searches may be unconstitutional. Finally, Part V discusses three potential objections to the assertion that exit searches are unconstitutional—lack of expectation of privacy, consent, and a hypothetical safety-justified exit search—and rejects each objection in turn.

I. DEFINITION & SCOPE OF EXIT SEARCHES

The federal administrative regulations governing exit searches were codified in 2003.⁷ These regulations give blanket authority to *every* federal agency to conduct searches of every individual's personal effects upon entering or exiting any federal property.⁸ Entry searches of both employees and visitors to government buildings have been approved by the courts for decades; these courts cite the safety concerns associated with building entry as the constitutional justification for their use.⁹ Exit searches, on the other hand, do not enjoy the same historical judicial approval.¹⁰

Although it is unclear for how long exit searches have been permitted or performed,¹¹ such searches were conducted on at least

⁷ Compare 41 C.F.R. § 102-74.370 (2003) (containing a specific provision for exit searches), with 41 C.F.R. § 102-74 (2002) (failing to contain any provision specifically allowing for exit searches).

⁸ 41 C.F.R. § 102-74.370 (2011) (giving express authority to all federal agencies to conduct such searches “at their discretion”).

⁹ See, e.g., *Justice v. Elrod*, 832 F.2d 1048, 1050 (7th Cir. 1987) (denying appeal of motion to dismiss in the case of an attorney who refused to be searched before entering a courthouse, and was thus denied entry, because such a search is “constitutionally unproblematic where as here there is some reason—there needn’t be much—to expect that armed and dangerous people might otherwise enter”); *McMorris v. Alioto*, 567 F.2d 897, 899–901 (9th Cir. 1978) (upholding entry searches instituted at a San Francisco courthouse in 1974 because of “threats of violent acts directed at courthouses”); *Downing v. Kunzig*, 454 F.2d 1230, 1231–33 (6th Cir. 1972) (finding entry searches to federal buildings—instituted because of “bombings of federal buildings and hundreds of bomb threats”—constitutional because of the imminent safety threat and the “minimal interference . . . with personal freedom”).

¹⁰ See *infra* Part III (describing the history of the special needs search exception to the Fourth Amendment).

¹¹ See *supra* note 7 and accompanying text.

some federal properties at least as far back as the year 2000—three years prior to the passage of the GSA regulations.¹² Unfortunately, there has been no comprehensive research completed into which federal agencies conduct these exit searches; however, I know from personal experience and research that a variety of agencies have so availed themselves.¹³

Agencies conducting searches often post warning signs outside their buildings notifying those entering of the searches taking place inside. Exit searches are conducted by uniformed law enforcement officials, rather than agency administrators. They involve the opening and physical inspection of the contents of each exiting individual's packages, briefcases, papers, and other effects being carried out of the building. In certain cases, exit searches may involve an individual again passing through a metal detector, as they did during their entry search.¹⁴

The true purpose of an exit search must be to apprehend thieves concealing government property within their personal items; this is the most important feature distinguishing entry searches from exit searches. Entry searches are for the limited purpose of maintaining safety in buildings by detecting weapons or explosives.¹⁵ On the other hand, exit searches cannot be for safety purposes—any safety threat is already dealt with through a previously-conducted entry search. Further, there is no attendant safety threat in the exit search context because the subjects are *exiting*, and are by definition not threatening the building.

Another important feature distinguishing exit searches from entry searches is that individuals are not permitted to avoid exit searches.

12 See *United States v. Gonzalez*, 300 F.3d 1048, 1050 (9th Cir. 2002) (discussing the exit search of an employee of the McChord Air Force Base Exchange by a store detective which took place in the year 2000).

13 For example, agencies as disparate as the Bureau of Engraving and Printing (BEP) and the Library of Congress in Washington, D.C. conduct routine entry and exit searches of both employees and visitors. I was exit-searched dozens of times at the BEP between 2010 and 2011, and know from conversations with BEP employees that these searches continue to be performed in 2013. I was exit-searched at the Library of Congress in the Summer of 2010. As *Gonzalez* made clear, exit searches have, at least at some point, been conducted in commissaries on military bases. *Id.* See also Tim Richardson, *What Drives People to Steal Precious Books*, FINANCIAL TIMES, March 6, 2009, <http://www.ft.com/intl/cms/s/0/d41a83d6-09dc-11de-add8-0000779fd2ac.html>. Cf. *United States v. Kroesser*, 731 F.2d 1509, 1511-12 (11th Cir. 1984) (describing employee theft from BEP).

14 This Essay will, however, focus exclusively on the exit searches of “packages, briefcases and other containers,” 41 C.F.R. § 102-74.370, as it is unclear whether a second pass through a metal detector is affirmatively implemented and approved or rather incidental to exiting in certain cases.

15 See *supra* note 9 and accompanying text.

When entering a building, a person's right to simply walk away is paramount to the reasonableness of the search because the entire process is governed by individual choice.¹⁶ Exit searches have no such protection; once an individual has entered the government building, he is unable to leave that building until an exit search of their items is completed.¹⁷ Choice, and thus consent, is eliminated in the case of an exit search.

Exit searches are systematically conducted on every departing individual. They are not incident to a criminal investigation. A warrant is never issued prior to their being performed. Probable cause is not required, nor is even individualized suspicion that the subject has done something wrong. In sum, these are blanket, suspicionless searches conducted by law enforcement officers on individuals who have chosen to set foot in a government building, and who have already undergone one search as a condition of entry to the building.

II. THE FOURTH AMENDMENT'S PROTECTIONS

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"¹⁸ The Amendment was designed largely as an answer to the abuses the Framers had observed while they were citizens of Great Britain, especially the exercise of the general warrant and the nearly limitless discretion it gave government officials to conduct searches.¹⁹ This Amendment is particularly concerned with consent. That is, every person has the choice about what information to conceal from publicity and what to reveal.²⁰ The

16 See *United States v. Davis*, 482 F.2d 893, 910–11 (9th Cir. 1973) ("airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft"), *overruled by* *United States v. Aukai*, 497 F.3d 955, 960–62 (9th Cir. 2007) (en banc) (holding that "[t]he constitutionality of an airport screening search, however, does not depend on consent" because that "makes little sense in a post-9/11 world"). Consent nevertheless does play at least some small part post-9/11, as the Court in *Aukai* noted that "all that is required [for the search to be reasonable] is the passenger's election to attempt entry into the secured area of an airport." *Id.* at 961 (footnote omitted).

17 If someone could simply refuse the exit search and leave the building, the purpose of the exit search would be defeated. Anyone who wished to avoid the search could merely walk away without having to undergo any search at all. Exit searches definitionally, and practically, hinge on a lack of ability to withdraw from being searched.

18 U.S. CONST., amend. IV.

19 See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

20 See, e.g., Steven L. Willborn, *Consenting Employees: Workplace Privacy and the Role of Consent*, 66 LA. L. REV. 975, 979 (2006) ("[P]rotection when consent is withheld affirms society's respect for an individual's control over central aspects of his own existence.").

Fourth Amendment has nothing to say regarding information a person has freely chosen to reveal; this information is not private, and not protected. Regarding the things a person has elected to keep secreted, however, the government may search them—and in so doing destroy their privacy—only when the search is objectively reasonable. This standard of reasonableness is usually enforced by requiring the government to obtain a warrant upon an affidavit of probable cause prior to conducting a search.²¹

The Fourth Amendment guarantees protection against governmental intrusion into personal effects.²² The fact that a person carries a closed bag in public or to work does not make the contents of that bag subject to a lesser expectation of privacy than if the bag were left at home.²³ Thus, the “packages, briefcases and other containers” subject to exit searches under GSA regulation²⁴ are definitionally Fourth Amendment concerns.

Ensuring that these personal items are protected from unreasonable searches does not interfere with the proper functioning of government or rely on the assertion of mere technicalities. On the contrary, the Fourth Amendment was broadly designed to protect the liberty of individuals from government invasion of their private lives, safeguarding their privacy and security against arbitrary invasion; these protections are “basic to a free society.”²⁵ As Justice O’Connor wrote, “Blanket searches . . . can involve ‘thousands or millions’ of searches [and] ‘pos[e] a greater threat to liberty’ than do suspicion-based ones, which ‘affec[t] one person at a time.’”²⁶ The power to search carries with it “a vast potential for abuse,”²⁷ which is precisely the reason that power should be as circumscribed as possible.

21 U.S. CONST., amend. IV (“[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); *see also, e.g.*, *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (“It is a cardinal rule that, in seizing goods or articles, law enforcement agents must secure and use search warrants wherever reasonably practicable.”).

22 *See United States v. Ross*, 456 U.S. 798, 822-23 (1982) (“[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.”).

23 *See United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions . . . is due the protection of the Fourth Amendment Warrant Clause.”).

24 41 C.F.R. § 102-74.370 (2011).

25 *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 43 (1961).

26 *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 667 (1995) (O’Connor, J., dissenting) (quoting *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O’Connor, J., dissenting)).

27 *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998) (citing *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting)).

A. *The Fourth Amendment & The Administrative Search*

Exit searches fall into the category of searches that have often been politely termed “administrative” or “special needs” searches. The most obvious— and likely only—purpose of an exit search is to ensure that government-owned property is not stolen from federal buildings.²⁸ These searches are not incident to a criminal investigation, but instead are simply rote searches of every person exiting a building. Although administrative searches lack individualized suspicion and are certainly devoid of probable cause, the Supreme Court has historically carved out an exception to the Fourth Amendment’s strict warrant rule specifically for them. However, this exception has been subject to much stricter review by the Court over the past fifteen years, turning what was once a very deferential review of any “special need” asserted by the government into a more searching analysis, making the legal application of administrative searches more narrow than ever.²⁹

B. *Exception to the Warrant Requirement for Administrative Searches*

The following Part is a brief chronological review of important cases in which the Supreme Court approved suspicionless searches of individuals, homes, or personal effects between 1967 and 1997. The jurisprudence begins with the most limited acceptance of this category of searches yet culminates three decades later with near extreme deference to assertions by the government of “special needs” so as to justify the use of suspicionless searches. The purpose of this Part is not to cover in great detail all of the facts of these cases; rather, it is designed to provide a limited overview of the Court’s slide into deference prior to a discussion in Part II.C, *infra*, of the tightening of its standard review in these cases.³⁰

The first case in which the Supreme Court brought administrative searches under Fourth Amendment scrutiny was *Camara v. Municipal Court*.³¹ There, the Court generally held that the administrative inspection of a rented apartment by a city inspector looking for viola-

28 See *supra* note 13.

29 See generally Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L.J. 501, 549 (2004) (describing how the Court has “moved suspicionless programs away from executive and legislative discretion granted to ‘petty officers’ and towards a Fourth Amendment that constrains discretion by the need to show suspicion of wrongdoing or by demonstrating the existence of a compelling justification for dispensing with individualized suspicion”).

30 For a more comprehensive review of related cases, see RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 597-630 (2011).

31 387 U.S. 523, 533 (1967).

tions of the Housing Code was a reasonable search under the Fourth Amendment, by “balancing the need to search against the invasion which the search entails.”³² Informing the government interest side of the balancing test was the fact that “the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results.”³³ Although it held that these types of searches are reasonable, the Court required that an administrative warrant³⁴ be obtained by the housing inspector before the state could trump a person’s refusal of access to his private residence.³⁵ It is important to note that the governmental need making this search reasonable was a safety concern—the prevention and abatement of dangerous conditions.

Applying the framework announced in *Camara*, the Court over the next thirty years developed a jurisprudence that found reasonable every assertion of a governmental interest in an administrative search case. In *United States v. Martinez-Fuerte*, the Court approved suspicionless border searches of motor vehicles for illegal aliens by way of a fixed roadside checkpoint.³⁶ In this case the Court discarded the administrative warrant requirement that was held so important in *Camara*.³⁷ However, the Court purported to limit *Martinez-Fuerte* to its facts—permitting only short stops for questioning at fixed border checkpoints without a warrant or individualized suspicion.³⁸

The Court did not stop at border checkpoints, however, despite *Martinez-Fuerte* allegedly being confined to its facts. Just three years later in *Bell v. Wolfish*, the Court upheld body cavity searches without individualized suspicion of prison inmates who had recent contact

³² *Id.* at 536-37.

³³ *Id.* at 537.

³⁴ Unlike a traditional warrant, this special administrative warrant required no probable cause or individualized suspicion. *Id.* at 532. It instead was an official document that afforded the person whose house was being searched a “way of knowing whether enforcement of the municipal code involved requires inspection of his premises . . . of knowing the lawful limits of the inspector’s power to search, and . . . of knowing whether the inspector himself is acting under proper authorization.” *Id.*

³⁵ *Id.* at 539-40 (“[W]e therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection.”).

³⁶ 428 U.S. 543, 566 (1976).

³⁷ *Id.* at 564-65.

We do not think . . . that *Camara* is an apt model. It involved the search of private residences, for which a warrant traditionally has been required. . . . The degree of intrusion upon privacy that may be occasioned by the search of a house hardly can be compared with the minor interference with privacy resulting from the mere stop for questioning as to residence.

³⁸ *Id.* at 567 (“We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. And our holding today is limited to the type of stops [border checkpoint stops] described in this opinion.”) (citation omitted).

with non-inmates, citing the safety concerns associated with the uniquely dangerous environment present in prison.³⁹ The growing spiral into deference had begun.

Six years later, in *T.L.O.*, the Court crafted a new, overarching phrase to describe these searches: “special needs” searches.⁴⁰ The Court approved a warrantless search performed by a school principal of a student who was suspected of possessing drugs.⁴¹ Unlike *Martinez-Fuerte* or *Wolfish*, the school administrator *did* have individualized suspicion, although he did not have a warrant or probable cause.⁴² The Court explained that strict adherence to the probable cause requirement in a school setting was not necessary, and pointed out that administrators have the special need “to maintain order” in school while they stand in loco parentis—a safety interest.⁴³

Two terms later, in *O'Connor v. Ortega*, a plurality of the Court approved the special-needs-based administrative search of a state employee’s desk and file cabinet for evidence of wrongdoing.⁴⁴ This case will be returned to at much greater detail later in this Essay.⁴⁵

The Court in *New York v. Burger* approved the warrantless search of an automobile junkyard, citing the safety concerns associated with a highly regulated industry.⁴⁶ Later, in the companion cases of *Skinner* and *Von Raab*, the Court extended this line of special needs jurisprudence to allow drug testing of employees whose drug use might pose a public safety concern. In *Skinner* the concern had been proven in the record,⁴⁷ but in *Von Raab* the safety interest was merely speculative.⁴⁸

The 1990 case *Michigan Department of State Police v. Sitz* approved drunk driving checkpoints without a warrant or individualized suspicion, based on the safety interest associated with maintaining safe roads free of intoxicated drivers.⁴⁹ This case was clarified and limited

39 441 U.S. 520, 558-60 (1979).

40 *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”).

41 *Id.* at 346-48.

42 *Id.* at 345-46.

43 *Id.* at 341.

44 *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (plurality opinion).

45 *See* Part V.A, *infra*.

46 482 U.S. 691, 693, 703 (1987).

47 489 U.S. at 628.

48 *Nat'l Treasury Emps.' Union v. Von Raab*, 489 U.S. 656, 684 (1989) (Scalia, J., dissenting) (discussing his move from the majority in *Skinner* to the dissent here in *Von Raab*, because of a dearth of “well-known or well-demonstrated evils” presented in the facts of *Von Raab*, in marked contrast with *Skinner*).

49 496 U.S. 444, 455 (1990).

later in *City of Indianapolis v. Edmond*,⁵⁰ a case discussed in the next Part.

The last major case expanding the special needs jurisprudence was *Vernonia School District v. Acton*, which approved the drug testing of high school student athletes without individualized suspicion or probable cause.⁵¹ This was a departure even from *T.L.O.*, discussed *supra*, in which the school principal *did* have individualized suspicion of the student who was searched.⁵² The Court in *Acton* discussed the fact that school officials stand in loco parentis to minor children at school,⁵³ as in *T.L.O.*, and that instead of searching an entire school, the program was “directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”⁵⁴

Acton, decided in 1995, was the last case in which the Court was deferential to government in evaluating a claim of special needs to justify a search. The opinion served to open up all manner of students to drug testing without individualized suspicion even though the articulated safety interest was arguably much more attenuated than in any of the past special needs cases just discussed. Perhaps understanding this deference to be spiraling into a serious problem, the Court did an about-face and began to significantly contract this line of reasoning.⁵⁵

C. Contraction of the Administrative Search Exception

The Court began the diminution of this near-complete deference when it decided *Chandler v. Miller* in 1997.⁵⁶ There, the Court struck down a Georgia law that required all candidates for public office—despite a lack of evidence of illegal drug use by any of those candidates—to submit to warrantless, suspicionless drug tests. Such a search regime, the Court held, was not staked on any legitimate special need, but was merely symbolic.⁵⁷ The Court began its opinion by reaffirming the general precept that searches are ordinarily unrea-

50 531 U.S. 32, 39 (2000).

51 515 U.S. 646, 653 (1995).

52 See *supra* note 40 and accompanying text.

53 515 U.S. at 654-55.

54 *Id.* at 661-62.

55 See Sundby, *supra* note 30, at 515 (describing the recognition by the Court that its former special needs jurisprudence created the specter of a return to the vices of the general warrant, and its initial reaction to this problem in *Chandler v. Miller*).

56 520 U.S. 305 (1997).

57 *Id.* at 322 (“The need revealed, in short, is symbolic, not ‘special,’ as that term draws meaning from our case law.”).

sonable without at least some measure of individualized suspicion.⁵⁸ Particularly important in this case is the Court's reiteration of a pervasive theme from the earlier, pre-contraction cases: "[W]here the risk to *public safety* is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."⁵⁹ The Court continued, "But where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."⁶⁰ Arguably faced with the consequences of its deferential jurisprudence—a suspicionless search regime foisted on candidates for elective office despite lacking evidence of drug abuse—the *Chandler* Court heightened its scrutiny and began to restrict the scope of the earlier cases.

Not wavering from its *Chandler* reasoning, the Court in *City of Indianapolis v. Edmond* struck down a random narcotics checkpoint,⁶¹ one that the district court had upheld relying on reasoning of *Sitz* and *Martinez-Fuerte*.⁶² In *Edmond*, the Court made even more explicit the new, searching analysis it applies to assertions by government agencies of "special needs" allowing them to conduct suspicionless searches without offending the Constitution. The Court held that every suspicionless search must be carefully scrutinized by the judiciary to ensure that the primary purpose of the search is not a bad faith "pretext for gathering evidence of violations of the penal laws."⁶³ Analyzing the precedent of *Martinez-Fuerte* and *Sitz*, and holding them to their facts, the majority cited the "considerations specially related to the need to police the border"⁶⁴ and the "imperative of highway safety"⁶⁵ as the *safety-based* special needs present in those two cases. However, the Court held that the narcotics checkpoint in *Edmond* was

58 *Id.* at 308.

59 *Id.* at 323 (emphasis added). It is crucial to note that the Court describes *entry* searches at public buildings and airports as motivated by public safety concerns and thus eminently reasonable. However, it noticeably fails to mention exit searches.

60 *Id.*

61 *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

62 *See Edmond v. Goldsmith*, 38 F. Supp. 2d 1016 (S.D. Ind. 1998).

63 *Edmond*, 531 U.S. at 45. This *subjective* evaluation of the government's motives stands in direct contrast with judicial evaluation of every other kind of search under the Fourth Amendment, where only *objective* evaluations of reasonableness are permitted. *See Whren v. United States*, 517 U.S. 806, 811 (1996) ("But only an undiscerning reader would regard these [suspicionless search] cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred.").

64 *Edmond*, 531 U.S. at 38.

65 *Id.* at 39.

starkly different; its primary purpose was the advancement of “the general interest in crime control,”⁶⁶ therefore making it unconstitutional. Where a search involves law enforcement and the pursuit of crime control, individualized suspicion is an irreducible component.⁶⁷ The Court did clarify that its holding did not overrule *Sitz* or *Martinez-Fuerte*, however, but confirmed that these two holdings are limited to allowing suspicionless searches *only* when public safety is genuinely at issue.⁶⁸

Finally, in *Ferguson v. City of Charleston*, the Court extended the reasoning of *Chandler* and *Edmond* to strike down a hospital-based, suspicionless program of drug-testing pregnant women, where those who tested positive were reported to law enforcement officials as criminal suspects.⁶⁹ Although the Court left open the possibility that such searches would not be unreasonable had the subjects consented,⁷⁰ it essentially ignored the issue in its analysis and assumed that no informed consent was given.⁷¹ Given that posture, the Court smoothly dispensed with the government’s asserted special need of medical health concerns, holding that such searches do not rise to the level of reasonableness required to permit a suspicionless search. The government’s stated purpose was “ultimately indistinguishable from the general interest in crime control”⁷² as the “immediate objective of the searches was for general evidence *for law enforcement purposes*.”⁷³ Paramount to this holding was the fact that at least the threat of law enforcement involvement was present: “In other special needs cases, we have tolerated suspension of the Fourth Amendment’s warrant or

66 *Id.* at 44 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)).

67 *Id.* at 47 (“When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.”).

68 *Id.* at 47-48 (“Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”).

69 *Ferguson v. City of Charleston*, 532 U.S. 67, 69-72 (2001) (noting that those testing positive faced potential charges of simple possession, possession and distribution to a person under the age of 18, or unlawful neglect of a child).

70 *Id.* at 69-70.

71 *Id.* at 76 (“[W]e necessarily assume for the purpose of our decision . . . that the searches were conducted without the informed consent of the patients.”). Even on remand from the Supreme Court to consider consent, the Fourth Circuit held that consent was not present in the case. *See Ferguson v. City of Charleston*, 308 F.3d 380, 386 (4th Cir. 2002) (“[N]o rational jury could conclude . . . that the Appellants gave their informed consent to the taking and testing of their urine for evidence of criminal activity for law enforcement purposes.”).

72 *Id.* at 81 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (quotation marks omitted)).

73 *Id.* at 83.

probable cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement.”⁷⁴

Thus, the Court has significantly heightened its scrutiny when the government asserts a special needs justification for conducting warrantless, suspicionless searches.⁷⁵ Although the special needs claims approved in the pre-1997 cases often had only an attenuated relation to safety, the Court has since made explicit that a special needs search *must* have a safety interest at stake. Further, the Court has made clear that a legitimate safety interest must be apparent, not fabricated, and certainly not a pretext for law enforcement officers to enforce the penal laws. Moreover, the involvement of law enforcement with any suspicionless search regime makes it instantly suspect and subject to heightened judicial scrutiny. Any suspicionless search that fails this strict, non-deferential analysis is an unconstitutional violation of the subject’s Fourth Amendment rights.

III. PRIOR APPLICATION OF THE WARRANT EXCEPTION TO EXIT SEARCHES

Only one case has ever explicitly dealt with the issue of the constitutionality of an exit search. In that case, the Ninth Circuit found *constitutional* the exit search with which it was presented.⁷⁶

A. *United States v. Gonzalez*

The Ninth Circuit dealt with this matter as one of first impression. Unaided by both litigants—who proved unable to cite much, if any, relevant case law in their briefs—the court was unable to uncover of its own accord anything directly on point.⁷⁷ The case was not appealed to the Supreme Court, and so the Court has never been pre-

⁷⁴ *Id.* at 79 n. 15 (citing *Skinner*, *Von Raab*, and *Acton*).

⁷⁵ The Court has not struck down *every* search justified by special needs since 1997. For example, in *Illinois v. Lidster*, the Court found reasonable a “highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident.” 540 U.S. 419, 421 (2004). Despite applying the heightened scrutiny afforded suspicionless searches found *Chandler*, *Edmond*, and *Ferguson*, the Court found the search in *Lidster* reasonable because its primary purpose was not general crime control, and it was designed to elicit information about people who were *not* stopped at the checkpoint. *Id.* at 423. Furthermore, public safety was at issue in that the police were searching for the specific perpetrator of a violent crime. *Id.* at 427.

⁷⁶ *United States v. Gonzalez*, 300 F.3d 1048, 1055 (9th Cir. 2002) (“This search was reasonable.”).

⁷⁷ *Id.* at 1052 (“Oddly, neither *Gonzalez* nor the government cites any authority in point on government employer random theft searches of employees’ closed containers, and we have found none.”).

sented with the opportunity to consider the merits of exit searches directly.

The facts of *Gonzalez* are relatively straightforward. Gonzalez was an employee of the McChord Air Force Base Exchange, a military department store near Tacoma, Washington.⁷⁸ While Gonzalez was a government employee,⁷⁹ he was not a member of the military (military exchanges are operated by a civilian Department of Defense Agency called the Army and Air Force Exchange Service).⁸⁰ Gonzalez had previously signed a form stating that he consented to being searched as a condition of employment, although the opinion did not provide the exact language of the agreement.⁸¹ One day, Gonzalez was randomly exit-searched as he was leaving work by a “store detective”⁸² who did not have a warrant, probable cause, or even individualized suspicion.⁸³ The sole purpose of the search was “to deter and apprehend theft by employees.”⁸⁴

This search turned up four packages of spark plugs priced at \$3.75 each (\$15 total), which Gonzalez had attempted to steal by concealing them in his closed, personal backpack.⁸⁵ In pretrial motions before the district court, and on appeal, Gonzalez alleged that this exit search was a violation of his Fourth Amendment rights; he further alleged that any consent he had allegedly given to be searched was invalid.⁸⁶

The court began its analysis by ignoring the issue of consent, tacitly admitting its unimportance to the analysis.⁸⁷ The court then con-

78 *Id.* at 1050.

79 *Id.*

80 See AAFES, *About Exchange*, available at <http://www.shopmyexchange.com/aboutexchange/>.

81 *Id.* at 1052 (“Mr. Gonzalez signed or initialed some sort of paper when he started work that indicated his understanding that belongings such as his backpack might be inspected, but the government did not submit the paper as evidence, so we don’t know what it says.”). Despite the insufficiency of the government’s evidence, Gonzalez’s counsel conceded the point as well. *Id.* (“Nevertheless, Mr. Gonzalez concedes that he signed or initialed some such paper when he commenced work at the base exchange, that he knew such random searches were store policy, and that he allowed the search of the backpack because and only because he felt he had no choice.”).

82 *United States v. Gonzalez*, 300 F.3d 1048, 1050 (9th Cir. 2002).

83 *Id.* at 1051.

84 *Id.* Moreover, the court continued, “Here there was no individualized suspicion, and the government interest for which the search was instituted was merely prevention of employee theft, as opposed to preserving human life and safety or national security.” *Id.* at 1052.

85 *Id.* at 1050, n.2.

86 *Id.* at 1051-52.

87 *United States v. Gonzalez*, 300 F.3d 1048, 1052 (9th Cir. 2002) (“We do not reach the issue of whether Mr. Gonzalez consented to the search, or whether there was anything defective about his consent.”). See also Part V.A.1, *infra* (discussing how judicial restraint

tinued on to the constitutional issue of the individualized suspicion requirement and found that the search was reasonable, despite the lack of individualized suspicion or probable cause.⁸⁸ Although the court initially considered language from *O'Connor* in formulating analysis, which specifically states, “[t]he appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage,”⁸⁹ the court ultimately rejected it and found the exit search “reasonable under the circumstances.”⁹⁰ In reaching this conclusion, the court cited only *T.L.O.*⁹¹ and its own case, *United States v. Bulacan*,⁹² for support, both of which the court admitted were “distinguishable.”⁹³ *T.L.O.* considered the search of a high school student by a school administrator who stood in loco parentis and who had individualized suspicion of wrongdoing.⁹⁴ *Bulacan* involved an entry search to a government building designed specifically for the purpose of dealing with security threats.⁹⁵ Despite the stark disparity between these cases and the facts of *Gonzalez*, and the existence of the contrary cases of *Chandler*, *Edmond*, and *Ferguson*,⁹⁶ the court nevertheless found the exit search of *Gonzalez* reasonable—substituting its own sensibilities regarding how to run a business for sound legal judgment provided by following Supreme Court precedent.⁹⁷

B. Explication of the Ninth Circuit’s Ruling in *Gonzalez*

A combination of factors created the perfect storm that produced the puzzling ruling in *Gonzalez*. The first and perhaps most important issue is that *Gonzalez* was a particularly unsympathetic defendant. The initial discussion in the opinion dealt with the government’s ar-

principles require that cases be resolved on the non-constitutional issue whenever possible).

88 *Gonzalez*, 300 F.3d at 1055.

89 *Id.* at 1053 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987)) (internal quotations omitted).

90 *Id.* (quoting *Ortega v. O'Connor*, 146 F.3d 1149, 1158 (9th Cir. 1998)) (internal quotations omitted).

91 *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); see also Part II.B, *supra*.

92 156 F.3d 963, 964 (9th Cir. 1998).

93 *Gonzalez*, 300 F.3d at 1053 (“In *Bulacan*, the search was of a woman’s handbag as she came into a government building. The search was for security threats to those in the building, not for things stolen from the building.”) (citing *Bulacan*, 156 F.3d at 966) (footnote omitted).

94 See *supra* note 40 and accompanying text.

95 *Gonzalez*, 300 F.3d at 1053-54 (“In *Bulacan*, the justification for the search was protection of the people in the building from explosives and weapons . . .”).

96 See Part II.C, *supra*. None of these cases were considered by the court in its *Gonzalez* opinion.

97 *Gonzalez*, 300 F.3d at 1054 (“It’s hard to run a store if the employees walk out with the inventory.”).

gument that Gonzalez had been a fugitive from the law, or at least had not complied with the conditions of the sentenced probation pursuant to his conviction.⁹⁸ Further, from the outset, the court was “dismay[ed]” that this case should ever have reached its bench.⁹⁹

Concerning the court’s marked lack of sympathy for the defendant, it is undisputed that Gonzalez was factually *guilty* of theft. Gonzalez was not an innocent person who was unreasonably searched; rather, Gonzalez was a decidedly guilty defendant attempting to use the Fourth Amendment as a shield to exclude from consideration the evidence of his misdeed. Furthermore, there is an acute problem of courts *routinely* producing bad law in the context of Fourth Amendment violations in criminal cases; the remedy for a violation of a defendant’s Fourth Amendment rights is merely suppression at trial of the illegally obtained evidence.¹⁰⁰ The innocent citizen whose privacy rights have been violated by government actors but who is not charged with a crime is effectively stuck in an impossible “remedial gap”—“left to pay for the government’s constitutional wrong,” the victim of a regime that “can in many cases recover from neither the [offending] officer nor the government.”¹⁰¹

The criminal defendant is an “awkward champion” of Fourth Amendment rights, who “is self-selected and self-serving . . . unrepresentative of the larger class of law-abiding citizens.”¹⁰² This defendant is “despised by the public, the class he implicitly is supposed to represent,” and cares “only about exclusion—and can get only exclusion—even if other remedies (damages or in-

98 *Id.* at 1051. The government argued that Gonzalez was, at least for a time, a fugitive, and consequently his appeal should have been dismissed pursuant to the fugitive disqualification doctrine. *Id.* Although the court rejected this argument, it certainly set the stage for denial of Gonzalez’s appeal on other grounds.

99 *Id.* at 1050 n.2 (“We share the reader’s dismay that this constitutional question should be posed, and that Mr. Gonzalez should have imposed criminal consequences upon himself, over \$15 worth of spark plugs.”).

100 *See* *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (holding that the exclusionary rule applies both in federal and state courts, and that this ruling “close[d] the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct”).

101 Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994); *see also* MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 425 (3d. Ed. 2007) (discussing the fact that there exist, in theory, private remedies for victims of unreasonable searches and seizures, but that these are not a “common method of dealing with improper searches or seizures” as the plaintiffs encounter large legal obstacles such as sovereign immunity for states and qualified immunity for state actors).

102 Amar, *supra* note 101, at 796.

junctions) would better prevent future violations.”¹⁰³ The exclusionary rule “renders the Fourth Amendment contemptible in the eyes of judges and citizens,” and consequently, judges “distort doctrine, claiming the Fourth Amendment was not really violated.”¹⁰⁴ This was precisely the case in *Gonzalez*—an unsavory defendant caused the creation of yet another example of bad law in the Fourth Amendment arena.

As if *Gonzalez* being an unsympathetic defendant were not enough to produce this aberrant result, his counsel was so inadequate in representing him that it likely rose to the level of ineffective assistance of counsel.¹⁰⁵ Despite the fact that *Gonzalez* was argued before a panel of the Ninth Circuit in October of 2001, *Gonzalez*’s public defender failed to cite any of the aforementioned dispositive cases: *Chandler*, *Edmond*, *Ferguson*.¹⁰⁶ Had this lawyer made arguments based on the changes evident in the Supreme Court’s jurisprudence regarding suspicionless searches, the Ninth Circuit’s analysis certainly must have been different, if not the outcome of the case.

Had these cases been discussed, the court at the very least would have had to grapple with the fact that this search was in no way related to public safety—as was admitted by the government¹⁰⁷—in tension with *Chandler*. It would have been forced to explain a holding that contradicted *Edmond*, which explicitly declared unconstitutional any suspicionless searches that are for the primary purpose of gathering “evidence of violations of the penal law.”¹⁰⁸ The government uncontroversially admitted that the search program discussed in *Gonzalez* was designed to elicit evidence of violations of the penal laws.¹⁰⁹ And finally, the court would have had to deal with the fact that the store detective who accosted *Gonzalez* was a law enforcement officer; as *Ferguson* made clear, a principle reason for finding the drug testing of

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 799 (“If exclusion is the remedy, all too often ordinary people will want to say that the [Fourth Amendment] right was not really violated. At first they will say it with a wink; later, with a frown; and one day, they will come to believe it.”).

¹⁰⁵ See *Strickland v. Washington*, 466 U.S. 668 (1984) (describing the two-pronged standard for adjudicating whether counsel for a defendant is inadequate; the first prong is whether the defendant’s counsel was factually inadequate (cause), and the second prong is whether the inadequacy of that counsel prejudiced the defendant’s case (prejudice)).

¹⁰⁶ Each of these cases was decided prior to October of 2001. *Ferguson*, the last case in this line, was decided on March 21, 2001. Cf. Part II.C, *supra*.

¹⁰⁷ *Gonzalez*, 300 F.3d at 1051 (“Based on the government’s concessions . . . [the purpose of the search] was to deter and apprehend theft by employees.”).

¹⁰⁸ *Edmond*, 531 U.S. at 45.

¹⁰⁹ Theft is obviously a violation of the penal law. Catching and punishing such theft was the purpose of the program that resulted in *Gonzalez* being caught stealing. As a result of his being apprehended, *Gonzalez* pleaded guilty to larceny, which is a violation of 18 U.S.C. § 641. See *Gonzalez*, 300 F.3d at 1050 n.3.

pregnant women unconstitutional was the “entanglement with law enforcement.”¹¹⁰ Given these considerations, it is likely that the result in *Gonzalez* would have been markedly different had the defendant been even remotely sympathetic or had his counsel been even minimally effective on appeal. Consequently, the Ninth Circuit’s analysis in this case is incorrect and ought to be reexamined.¹¹¹

IV. RECONSIDERATION OF THE CONSTITUTIONALITY OF EXIT SEARCHES

In light of the heightened scrutiny now required of suspicionless searches based on Supreme Court precedent in *Chandler*, *Edmond*, and *Ferguson*, the exit searches as presently carried out are unconstitutional. Allowing for broad discretion to conduct searches of any person departing a government building contravenes the now extremely limited scope of permissible special needs searches.

To briefly reiterate the nature of these exit searches: they are conducted on every person leaving a building without a warrant, probable cause, or even individualized suspicion. They are conducted by police officers and, exactly as the government conceded in *Gonzalez*, the only plausible justification for them is apprehension of crime—there is no safety interest at stake, whatsoever. Exit searches are performed on both government employees and visitors. And, they are conducted on individuals who have already undergone one invasive, suspicionless search—the search required to *enter* the building. Any safety issue, such as a concern that someone might unlawfully possess a gun or explosives, must undoubtedly have already been addressed by the previously conducted entry search.

For suspicionless searches to be unrelated in any way to public safety directly contradicts the lessons of *Chandler* and makes them instantly suspect. Recall the poignant language from the *Chandler* decision: “But where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”¹¹² Even if these searches are quick, expedient, necessary to stop theft, or desired by agencies, they cannot be found constitutional.

The exit search regimes further fail *Edmond* analysis—which proscribes suspicionless searches for the purposes of general crime control—because they are for the purpose of ferreting out those who

110 *Ferguson*, 532 U.S. at 79 n.15 (citations omitted).

111 It is important to note again that *Gonzalez*’s ineffective counsel failed to petition the Supreme Court for certiorari in this case. Consequently, the Supreme Court has never had an opportunity to examine the issue of exit searches specifically.

112 *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

have stolen items from government buildings and in part for deterring those who might otherwise steal, both law enforcement purposes.

And to put the proverbial icing on the cake, these searches contravene *Ferguson*, which makes explicit the maxim that if a suspicionless search is conducted by law enforcement, it is most likely illegitimate. Recall also the powerful language from that case: “In other special needs cases, we have tolerated suspension of the Fourth Amendment’s warrant or probable cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement.”¹¹³ Every exit search thus far identified is conducted by police officers clad in traditional uniforms and armed with a deadly weapon. This systematic search system of thousands of people on a daily basis by uniformed police officers looking for mere theft without individualized suspicion cannot pass constitutional muster in light of the Supreme Court’s recent jurisprudence, and it therefore must be seen as an unreasonable infringement on our constitutionally guaranteed rights.

V. POTENTIAL OBJECTIONS TO ASSERTIONS OF UNCONSTITUTIONALITY

Several objections naturally follow from this Essay’s assertion that exit searches are unconstitutional: (1) that individuals lack an expectation of privacy when exiting government buildings; (2) that people have consented to being exit searched by virtue of their presence in government buildings; and (3) that Fourth Amendment rights are overridden if an exit search is justified by safety or security interests. The first and second objections are considered and rejected, while the third objection is accepted as a limited possibility—one that has not been identified in any of the presently-known exit search schemes affected by the government—which *could* theoretically be found reasonable under the current Supreme Court jurisprudence.

A. *Expectation of Privacy*

Analyzing exit searches based on the plurality opinion in *O’Connor v. Ortega*¹¹⁴ might tempt an argument that those who enter government buildings have no expectation of privacy in their personal be-

¹¹³ *Ferguson*, 532 U.S. at 79 n.15.

¹¹⁴ 480 U.S. at 711-729 (1987) (approving the search of the office of a government physician by balancing the physician’s expectation of privacy against the government’s interest in the efficient operation of the workplace).

longings. Every exit search scheme actually identified is being performed on persons who have already been searched upon entering the government building. Signs are often posted outside of buildings where the government has implemented these procedures which inform people of the searches ahead of time and allow them to choose not to enter the building. By entering these buildings, do individuals cede their expectations of privacy until after they have left?

In *O'Connor*, the Court held that a government-employed physician had a reasonable expectation of privacy in his office, such that a search thereof triggered Fourth Amendment concerns.¹¹⁵ In light of that decision, a plurality of the Court then established a two-part test for determining whether a workplace search is reasonable: (1) whether an individual has a reasonable expectation of privacy in the thing to be searched, and (2) if so, the individual's privacy right must be balanced against the "government's need for supervision, control, and the efficient operation of the workplace."¹¹⁶

Dr. Ortega was found to have a reasonable expectation of privacy in at least his desk and file cabinets because he did not share his office with others and kept personal items out of sight in his desk and file cabinets.¹¹⁷ The government interest informing the other side of the balancing test was the "efficient and proper operation of the workplace."¹¹⁸ Indeed, the plurality found a special need for searches without probable cause in two situations: "legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct."¹¹⁹ However, the Court remanded the case without deciding the ultimate issue because the factual record from the district court was incomplete and further proceedings were required to determine the "reasonableness of both the inception of the search and its scope" pursuant to the plurality's announced rules.¹²⁰

Even if we were to treat the plurality opinion in *O'Connor* as a holding, there are a number of caveats ensuring that its rules do not apply to exit searches. The first issue is that, by its own terms, *O'Connor* likely does not apply to the closed, personal luggage that is the subject of exit searches:

Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee

115 *Id.* at 718.

116 *Id.* at 719-20.

117 *Id.* at 718-19; *cf.* *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposed to the public, even in his home or office, is not a subject of Fourth Amendment protection.").

118 *O'Connor*, 480 U.S. at 723.

119 *Id.* at 725.

120 *Id.* at 729.

may bring closed luggage to the office . . . or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address.¹²¹

A person's expectation of privacy in a closed bag is not diminished simply because that bag is brought to work.

Yet, even assuming, *arguendo*, that the presence of an exit search program diminishes the reasonable expectation of privacy in closed personal items on federal property, *O'Connor* does not constitutionally justify their use. The hospital administrators in *O'Connor* had individualized suspicion that Ortega had engaged in work-related misconduct;¹²² by definition, no such suspicion exists with an exit search. *O'Connor* approved a work-related search, "unrelated to illegal conduct";¹²³ an exit search is specifically designed to root out illegal conduct, notably theft.¹²⁴ *O'Connor* approved searches performed by a civilian supervisor, specifically stating that the opinion cannot be taken to justify searches conducted by law enforcement.¹²⁵ Exit searches are conducted by police officers and therefore *O'Connor* explicitly disallows them. And, even if exit searches were hypothetically performed by civilians, such as museum employees, the analysis would not change; the rule is now clear, based on *Chandler*, *Edmond*, and *Ferguson*, that exit searches must be safety-based, and *not* for the purposes of discovering criminal activity.

B. Consent

Another objection may be based upon the principles of consent.¹²⁶ Although persons on federal property do not have a diminished ex-

¹²¹ *Id.* at 716.

¹²² *Id.* at 726. Individualized suspicion was discussed in the case and determined to exist, but was not a dispositive issue. Had there been a lack of individualized suspicion, the Court would have been compelled to determine whether individualized suspicion is a necessary component of reasonableness.

¹²³ *Id.* at 721.

¹²⁴ *See supra*, note 107 and accompanying text.

¹²⁵ *O'Connor*, 480 U.S. at 717 ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.").

¹²⁶ Attempting to debate the merits of what constitutes consent is largely beyond the scope of this Essay, as it is a tortured, normative issue that is not easily agreed upon and depends largely upon context.

pectation of privacy in their personal items,¹²⁷ it is possible that entrance onto federal property constitutes consent to being searched and thus prevents the constitutional issue from being reached. This argument is especially salient in the context of exit-searching employees and independent contractors doing business with the government; these individuals are the most pervasively exit-searched and presumably “consent” to being searched as a condition of their employment. Moreover, signs are often posted outside of buildings where exit searches are performed, notifying those entering that they must consent to being searched. However, there are a number of considerations that must be seen as undermining consent in this context, making it suspect, invalid, or unconstitutional.

1. Courts Consistently Abandon Consent as an Issue

The Supreme Court has mentioned in dicta on a number of occasions that a possible cure to an otherwise unconstitutional search is consent.¹²⁸ As discussed earlier, the Fourth Amendment creates a regime where choice reigns supreme—individuals have the right to choose what things to keep hidden from public view and what things to reveal.¹²⁹ Yet, in every case where the Court has adjudicated the constitutionality of a special needs search,¹³⁰ consent has dropped out as an issue altogether. Every single case could effectively be recategorized as one in which the aggrieved party consented. In *Martinez-Fuerte*, for example, driving through a fixed checkpoint—or even driving near an international border—could be seen as consenting to a search. Engaging in high school athletics, as in *Acton*, could be recast as a consent issue. Working for the government, as in *O'Connor*, could be seen as tacit consent to a search, especially if an employee signed a paper authorizing a search or if warning signs were posted notifying employees of the possibility of being searched. No doubt the drug testing of pregnant women at a hospital, as in *Ferguson*, could be seen as consensual.¹³¹

Yet, the Court has consistently refused to analyze these cases in terms of consent, ignoring the consent issue altogether, or “necessari-

127 See Part V.A, *supra*.

128 See, e.g., *Camara v. Mun. Ct.*, 387 U.S. 523, 528-29 (1967) (“[E]xcept in certain carefully defined classes of cases, a search of private property *without proper consent* is ‘unreasonable’ unless it has been authorized by a valid search warrant.”) (emphasis added).

129 See Part II, *supra*.

130 See generally Parts II.B & II.C, *supra*.

131 See *Ferguson*, 532 U.S. at 93 (Scalia, J., dissenting) (lamenting the majority opinion in part because he believed that the taking of the urine specimens was consensual and therefore constitutional).

ly assum[ing]” that searches were conducted without informed consent.¹³² This is notwithstanding the fact that it is the policy of the Court to decide cases on nonconstitutional grounds when possible, avoiding the constitutional issue unless absolutely necessary to decide a case.¹³³ This proves that the consent issue in these cases must have been affirmatively ignored, rather than merely “not reached,” because any of these cases could have been cast aside on the narrow issue of consent without reaching a constitutional holding.

This glaring rejection of consent arguments also extends to government workers, despite the pervasiveness of consent as a defense by *private* employers to defeat employee lawsuits in other contexts.¹³⁴ In *Gonzalez*, the only case that discusses exit searches specifically, consent was also largely ignored by the Court,¹³⁵ despite the admission by the appellant that he “understood ‘that employees were required to allow such searches’ because he had signed something when he started work so indicating.”¹³⁶ Consent was even summarily discarded as an issue in *City of Ontario v. Quon*, the only other case in which the Supreme Court again grappled with the issues decided by the plurality in *O’Connor*, a case in which consent was more than palpable.¹³⁷ Consequently, it is unclear that consent is even a serious consideration at all in cases of special needs searches, as courts *uniformly* ignore any inkling of consent and reach the constitutional issue—even when consent is assuredly manifest.

132 *Id.* at 76, 93.

133 *See, e.g.,* *Three Affiliated Tribes v. Wold Eng’g*, 467 U.S. 138, 157 (1984) (“It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.”).

134 *See, e.g.,* *Feminist Women’s Health Ctr. v. Sup. Ct.*, 61 Cal. Rptr. 2d 187 (Ct. App. 1997) (rejecting a former employee’s claims of invasion of privacy and wrongful discharge despite having been required by her employer to disrobe and display her vagina as a condition of employment, based on the fact that the employee had consented).

135 *United States v. Gonzales*, 300 F.3d 1048, 1052 (9th Cir. 2002) (“We do not reach the issue of whether Mr. Gonzalez consented to the search . . .”).

136 *Id.* at 1050. If this did not constitute consent, virtually no action could logically be conceived as consensual in these cases.

137 *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010). In this case, the Court approved the legitimate “noninvestigatory, work-related” search of an employee’s cell phone, which turned up evidence of the sending of sexually explicit messages by Sgt. Quon to his mistress during work hours. *Id.* at 2626, 2628. Despite the fact that the city owned the cell phone Quon was using, that Quon had signed a computer consent policy giving the city the ability to monitor employees’ e-mail and internet use, and that the city explicitly warned Quon that text messages would be treated the same as e-mails for the purpose of monitoring, the Court all but ignored the obvious consent issue and went on to decide whether the search was constitutionally valid in light of *O’Connor*. *Id.* at 2625.

2. *Consent Is Coerced*

Despite this analysis, if consent remains a consideration in cases of suspicionless special needs searches, any consent given should be seen as invalid because it is necessarily coerced. One clear reason for this assertion is that the subject of an exit search may not withdraw his consent to be searched.¹³⁸ If a person could withdraw consent to be exit-searched, that would effectively eviscerate all of its purposes—detering and discovering theft. Anyone who did not wish to be searched, whether stealing or not, could merely refuse the search. But if there is no meaningful choice in the matter, then the subject is necessarily being coerced at the time of the search.¹³⁹ Coercion destroys consent, and without consent, the analysis must return to Fourth Amendment reasonableness; and we now know that exit searches are unreasonable standing alone.

3. *Requiring Consent to Be Searched Violates the Unconstitutional Conditions Doctrine*

Even if one were able to overcome the coercion hurdle and argue that consent given to be searched is valid, exit searches still remain unconstitutional. For the government to condition a benefit upon giving up one's constitutional rights is itself violative of the Constitution—it contravenes the doctrine of unconstitutional conditions.¹⁴⁰ The unconstitutional conditions doctrine is the “principle that the government cannot condition a benefit on the requirement that a person forgo a constitutional right.”¹⁴¹ Thus, the “government may not deny a benefit to a person because he exercises a constitutional right.”¹⁴² “Unconstitutional conditions problems arise when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally pro-

¹³⁸ See Part I, *supra*.

¹³⁹ The concept of coercion is not limited to a lack of meaningful choice, but has often been defined as something less strict. See, e.g., *United States v. Jackson*, 390 U.S. 570, 583 (1968) (“A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.”).

¹⁴⁰ For the seminal work on unconstitutional conditions, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1988) (describing the definition of the unconstitutional conditions doctrine, its importance as a tool in correcting and deterring suppression of constitutional rights by the government, and its uneven application by the Supreme Court).

¹⁴¹ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 980 (2006).

¹⁴² *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1997); (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

fects from government interference.”¹⁴³ In the exit search context, the government requires an individual to surrender Fourth Amendment rights in order to utilize its property and gain any appurtenant benefits.

This doctrine applies equally to employees of the federal government and visitors to its properties. Entering government property confers a benefit on those who choose to do so. Employees enjoy the benefits of employment, including compensation; the benefit for visitors consists of whatever reason induced them to enter the building.¹⁴⁴ Nor are the benefits offered by the government a mere gratuity—government benefits are the “new property” of individuals.¹⁴⁵

The problem here is not that privacy may not generally be alienated to other private persons: “unconstitutional conditions cases ask not whether liberties are alienable generally, but only whether *government* may induce their surrender.”¹⁴⁶ The exercise of an unconstitutional condition allows the government to achieve an end-run around rights, which it would not be able to do if it did not offer a benefit. Allowing for unconstitutional conditions destroys private ordering,¹⁴⁷ diminishes the evenhandedness of government,¹⁴⁸ and creates a constitutional caste system.¹⁴⁹

The problem with the unconstitutional conditions doctrine is that, though it has existed for a century, it is unevenly applied by the

¹⁴³ Sullivan, *supra* note 140, at 1421-22.

¹⁴⁴ For example, visitors benefit from access to the extensive research materials available at the Library of Congress. See *History*, Library of Congress, <http://www.loc.gov/about/history.html> (last visited Mar. 18, 2012) (noting that the Library collection contains more than 155 million items).

¹⁴⁵ See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); see also Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (“Many of the most important . . . entitlements now flow from government . . . [s]uch sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.”); cf. *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (regarding with approval and accepting Reich’s views on government benefits, and finding actual property rights in one of the most seemingly obvious government “gratuities”—welfare benefits).

¹⁴⁶ Sullivan, *supra* note 140, at 1489-90.

¹⁴⁷ *Id.* at 1492 (“Government may not directly command or forbid actions protected by individual rights of speech, association, or reproductive privacy, for example, because these decisions belong in the realm of private ordering rather than government control.”).

¹⁴⁸ *Id.* at 1496 (“Unconstitutional conditions inherently classify potential beneficiaries into two groups: those who comply with the condition . . . and those who do not.”). Because entry into a government building and the attendant benefits provided thereby are conditioned on submission to an exit search, those who choose not to give up their Fourth Amendment rights are necessarily excluded from the benefits.

¹⁴⁹ *Id.* at 1497-98. Those who, for example, do not as readily need government benefits may preserve their constitutional liberties, while those who most need benefits, perhaps the indigent, must give up their constitutional rights in order to obtain the benefit.

Supreme Court. In many cases, the Court will strike down a government condition based on finding it to be an unconstitutional condition,¹⁵⁰ but in other cases, it will uphold laws that look identical to those with unconstitutional conditions problems.¹⁵¹ Consequently, this uncertainty makes it difficult to predict which treatment or outcome any particular case will receive.

One possible answer to this quandary is the germaneness of the condition to the benefit: the more germane a condition is to a benefit, the more deferential the review a court will conduct.¹⁵² The less germane, the more the condition looks coercive, like “extortion, bribery, manipulation, and subterfuge.”¹⁵³ Thus, for example, conditioning welfare benefits on residence in a state is highly attenuated, but refusing to subsidize discussions of abortions in federally funded family planning clinics is more germane.

Conditioning the entry to a government building upon being exit-searched clearly creates an unconstitutional condition—individuals are required to relinquish their Fourth Amendment rights in order to obtain the benefits of entry. And, the ability to come to work every day in a military commissary or to read books in the Library of Congress is exceedingly irrelevant to the government interest in exit-searching a person. With no safety interest at stake in an exit search, the required nexus between the benefit and the search is minimal and most probably nonexistent. When the true definition of and purposes behind exit searches come to light, these searches increasingly resemble manipulation—if a person wants a benefit the government provides in its buildings then they ought to be prepared to surrender their constitutional privacy rights. This practice plainly violates the unconstitutional conditions doctrine.

C. A Safety-Based Exit Search

Finally, there remains the possibility that certain discrete, hypothetical exit searches could be constitutionally justified by legitimate safety concerns. If safety-based, an exit search bears greater resem-

150 See e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (holding that denying welfare benefits to an individual who has lived in a state for less than a year impermissibly burdens, among other rights, the fundamental right to interstate travel); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549-50 (2001) (invalidating a statute that prevented lawyers receiving funding from the Legal Services Corporation from making certain arguments on their clients’ behalves).

151 See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 179 (1991) (upholding a law that prohibited “counseling concerning the use of abortion as a method of family planning” for family-planning organizations that receive federal funding).

152 See *Sullivan*, *supra* note 140, at 1457.

153 *Id.* at 1456-57. See pages 1456-68 for a full explication of the germaneness issue.

blance to an entry search and contains far fewer of the problematic hallmarks that this Essay has thus far described.¹⁵⁴ Indeed, if some exit search scheme were genuinely safety-based, it would likely pass constitutional muster. Some examples that could epitomize a constitutional exit search might be searches conducted on engineers leaving a nuclear power plant or National Security Agency (NSA) employees privy to documents containing classified national-security information as they leave the NSA facility.¹⁵⁵

However, my contention concerning exit searches is that they are unconstitutional as observed in practice. The regulations authorizing their promulgation are exceedingly broad, giving limitless discretion to agencies to create and implement exit search schemes.¹⁵⁶ And those exit searches admittedly have nothing to do with safety concerns; they are genuinely for the law enforcement purpose of theft apprehension and not an inkling more. Some exit searches *could* be constitutional, but this analysis shows that no exit search thus far identified *is* constitutional.

CONCLUSION

Exit searches, as currently implemented by our government, are patently unconstitutional. Pursuant to broad, discretion-less regulations, administrators of public buildings have been given license to implement these search schemes without any oversight. Day-in and day-out, these searches impinge on our Fourth Amendment rights to be free of the strictures of a government arbitrarily and unreasonably destroying the privacy we are due as autonomous beings. These searches undermine liberty while carrying vast potential for abuse.

At one time, the Supreme Court might have approved of these searches, when it openly deferred to legislatures and executives in their assertions of “special needs” justifying this or that suspicionless search. Perhaps realizing the unintended consequences of this open-ended jurisprudence, the Court has, over the past two decades, seriously curtailed the ability of the government to make these unjustifiable searches a reality. In contrast with the now-abandoned deference, the heightened scrutiny of today’s Court requires a specifically

154 Compare this with the justification for entry searches presented in *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978), which was the prevention of serious harm to government buildings by subversive individuals looking to detonate explosives.

155 This list is far from exhaustive. Given the intentional lack of clarity surrounding the nature of government occupations related to important security concerns, it is impossible to compile an exhaustive list—hypothetical safety-based searches such as these require a case-by-case reasonableness determination under the Fourth Amendment.

156 See 41 C.F.R. § 102-74.370 (2011).

articulable safety interest to search without suspicion and mandates that these searches not be for the purpose of ferreting out violations of the penal laws nor entangled with law enforcement officers. The exit searches being carried out daily violate all three of these conditions and consequently, cannot be seen as constitutional.

Any objections attempting to preserve the constitutionality of exit searches despite the Supreme Court's contraction of the special needs exception must fail. Individuals do not forfeit their expectation of privacy in closed personal items merely because they work for our government or wish to receive a benefit from access to its properties. Any nominal consent to an exit search is most certainly coerced, making it suspect and invalid. And, even if consent to an exit search could be shown to be a valid waiver of privacy, allowing the government to condition a benefit on the surrender of constitutional rights—which it could not require if it did not offer the benefit—violates the unconstitutional conditions doctrine. Violations such as these unfortunately make our government appear more like an unscrupulous rights-trader in the business of achieving an illicit goal than a defender of liberty. This behavior is incompatible with our Constitution.

This is not to say that certain hypothetical safety-based exit searches could not be constitutional, but only that the exit searches presently effectuated buckle under serious legal examination. Consequently, courts should heavily scrutinize exit searches and, finding them unconstitutional, return to us the rights that are presently being abrogated without justification.